

CORE Brief

Restrictive covenants and abortion access

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This brief examines the role of restrictive covenants—written stipulations in employment contracts that limit what healthcare providers can do—and potential opportunities for legal action related to restrictions on scope of practice. The brief also describes next steps for exploring the landscape of restrictive covenants in Wisconsin.

Abortion litigation context

Restrictive covenants can be considered in the context of abortion litigation. Abortion and reproductive rights strategies have typically been more reactive than proactive.

Reproductive rights advocates have often put more energy into blocking the passage of restrictive abortion laws than into preventing their introduction through litigation of existing laws.² Additionally, reproductive rights advocates and organizations feel pressure to only challenge cases which seem to be clear wins due to the perception that the risk of losing a case could set dangerous precedent.

The United States Supreme Court 2016 decision in *Whole Woman's Health v. Hellerstedt* may be a signal that bringing riskier cases could benefit reproductive healthcare access. In this decision, the Supreme Court ruled restrictions on abortion services put in place by the state of Texas created an “undue burden,” which had been established by *Planned Parenthood v. Casey* in 1992. Specifically, *Casey* established that abortion restrictions could be put in place as long as they did not create an “undue burden” on the person seeking abortion.

Restrictive covenant—commonly referred to as a noncompete agreement or a covenant not to compete—is a contractual provision between a physician and his or her employer that limits or prevents a physician's practice of medicine.

– American Medical Association¹

As justifications for abortion restrictions are scrutinized more closely by judicial actors, the reproductive rights movement is expanding the number of lawsuits brought to the courts.³ It is possible this change will include more lawsuits by healthcare providers whose practice has been restricted by admitting privilege requirements, limitations set by their employer such as restrictive covenants, and lack of abortion training opportunities. This brief focuses on restrictive covenants: clauses in employment contracts that limit the scope of practice for healthcare providers.

Restrictions on healthcare providers' scope of practice

Restrictions on healthcare providers' scope of practice, or what they *cannot do* unrelated to what their certification and training allows, typically manifest in three ways:

- There is a broad restriction on providing a specific procedure across a **healthcare system**. For example, in Catholic healthcare systems, there may not be restrictive covenant clauses in physicians' contracts which prevent them from providing abortion because there are system-wide policies prohibiting abortion services.
- There are restrictions at the level of a **health center or property**. A healthcare system may have a restriction that no abortions are performed within a particular center or on a particular property. In these cases, there may not be restrictions on physicians employed by that system.

- At the **individual provider** level, restrictive covenants in employment contracts limit what healthcare providers can do as a condition of their employment. These can limit a provider from working for a competitor and in some cases limit what procedures a provider can perform.

Based on a review of the literature and internet sources regarding individual-level restrictions, it appears that restrictive covenants most often are non-competition clauses by which a physician agrees not work for a competitor of their employer. These restrictions are becoming more ubiquitous in physician practice. Healthcare systems view restrictive covenants as a way to protect their investment in their employees. Typically, non-compete agreements prevent physicians from contracting with their employer’s competitors for a period of time following the end of their employment. Non-solicitation restrictions limit the way physicians can solicit patients and employees following employment to prevent a physician from establishing a private practice, for example.

There is considerable discussion about covenants’ not-to-compete clauses among physician and other healthcare provider associations. The American Medical Association advocates against the use of competition restrictions and advises physicians not to enter into an agreement that would restrict their practice on the grounds that restrictive covenants can disrupt continuity of care and limit access to care.⁴ Many other professional associations at the state and national level support AMA’s position.

Enforceability, prevalence, and awareness of restrictive covenants

While restrictive covenants are increasingly common, the purpose, scope, and enforceability of these covenants are not always clear.⁵ Restrictive covenants in physician employment contracts are governed by state or statutory law which varies across states. The AMA notes that “state courts generally view restrictive covenants in employment contracts with considerable skepticism given that these agreements are seen as a potential restraint on trade.”¹ Some states prohibit non-compete clauses in employment contracts while other states have specific rules related to the fairness and reasonableness regarding physician restrictions.⁶ Some state courts may limit overly broad restrictive covenants without striking down the entire agreement; these states are known as “blue-pencil” states.

“Blue pencil” guidelines mean a physician would likely have to provide evidence in court that a restrictive covenant is unfair, unreasonable, or will result in harms to physicians or patient populations broadly.⁵ Wisconsin, Arkansas, Georgia, Nebraska, and Virginia will enforce reasonable restrictive covenants, but are not considered “blue-pencil” states.

What is considered “reasonable” is debatable and the ambiguity of this term presents an opportunity for litigation. There are examples of state supreme courts

determining what is and is not reasonable on a case by case basis. The Supreme Court of New Jersey, a “blue-pencil” state, found that restricting a physician’s practice within a 30-mile radius of his former employer to be excessive, but changing the radius to 13 miles would be a reasonable.¹ In Wisconsin, courts turn to state statute (§103.465) in cases of disputed restrictive covenant reasonability.

Under **Wisconsin state law** (§103.465), restrictive covenants are “*lawful and enforceable only if the restrictions imposed are reasonably necessary for the protection of the employer or principal. Any covenant...imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint.*”⁷

Restrictive covenants have become more common as healthcare structures change from private practices to large, integrated health systems. A 2011 survey of surgical training graduates found the majority of respondents had signed an employment contract containing a restrictive covenant (53%). Further, of

respondents who changed employment, the restrictive covenant was enforced in 63% of cases.⁸ Because restrictive covenant language is not universally enforceable, more professional associations are advocating against their use. As a result, more courts are taking up cases on the enforcement of restrictive covenants.

More recently, health associations have argued restrictive covenants impact patient care in addition to physicians' ability to practice. Specifically, the American Academy of Family Physicians has argued for continuity and access to care.⁹ Courts have previously ruled in favor of maintaining doctor-patient relationships and promoting access to care.¹⁰ For example, a court in Pennsylvania ruled that a restrictive covenant was unreasonable in the case of a physician who was the only perinatologist in an underserved area.⁵

All examples of restrictive covenants related to abortion services identified in this review restrict services at the property level and in some cases these restrictive covenants have not been upheld in the courts. The next section details such a case.

Restrictive covenant case on abortion providers: Planned Parenthood of Greater Orlando v MMB Properties

MMB Properties and Planned Parenthood of Greater Orlando owned separate medical practices within a large medical park near a hospital in Florida. The Planned Parenthood clinic offered a range of services, including abortion. The complex had in place a restrictive covenant prohibiting all outpatient surgeries, except those that are “ancillary and incidental” to a physician’s practice. MMB sued Planned Parenthood to prevent the clinic from providing surgical abortions, citing the restrictive covenant. In 2017, the Florida Supreme Court voided the order, finding that because providing surgical abortion services was not the primary use for the site, the Planned Parenthood clinic could not be classified as a surgical center.¹¹ The restriction was poorly worded and left confusion regarding its intent to prohibit activities vs. prohibiting types of businesses.¹²

The lack of clarity in the restriction left room for Planned Parenthood not to be classified as a competitor. This logic could possibly be applied to restrictive covenants limiting physicians from performing abortions if their employer does not provide abortion services. This review did not identify instances of abortion providers taking up such cases, although it is possible they were missed.

Litigation opportunities

Litigation is increasingly used to challenge restrictive policies related to healthcare access. A study on the effectiveness of litigation as a tool for expanding healthcare access found litigation coupled with ongoing public health efforts was effective in expanding reproductive rights in Peru, Brazil, and India.¹³ The authors concluded litigation is a useful way to highlight healthcare system failures, challenge structures that perpetuate inequity, and inspire broader political change.

Courts have historically focused on the negative impact restrictive covenants have on physicians. There is growing evidence that not only do restrictive covenants impact physicians, but also their patients. Restrictive covenants of all types, including scope of practice restrictions, negatively impact long-term provider-patient relationships and result in lower quality of care.¹⁴

Further, many arguments have been made, and cases upheld, that physicians and other healthcare professionals should not have to provide services which do not align with their beliefs. A comparable argument could be made that a physician who entered the healthcare profession to improve the health of their patients and who wishes to offer comprehensive reproductive health services as part of their practice should not be barred from offering those services.

Potential next steps for research on restrictive covenants in Wisconsin

This review found no database or other repository of information about restrictive covenants on physicians' scope of practice. Informal interviews with two legal specialists who have extensive knowledge on abortion restrictions in Wisconsin confirmed that one could estimate the prevalence of restrictive covenants at the healthcare system level statewide, but it would not be possible to do so at the individual level. It is likely all healthcare systems start with a basic contract framework when hiring or employing a physician. Research could survey major healthcare systems in the state to identify which systems include a restrictive covenant that impacts physicians' ability to provide abortion services within and outside of their place of employment. Unless a physician has negotiated their contract to strike out a restriction or to lawfully contract with an abortion provider, all physicians with restrictive covenants could not perform abortions if their health system does not provide this service.

The legal specialists also reflected on the feasibility of this research. They believed that the general counsel for the University of Wisconsin School of Medicine and Public Health would respond positively to researchers' requests for information about restrictive covenants. Aurora Health may also be willing to share their basic contract structure to researchers if they are informed that the research also includes UW contracts. Researchers could also ask for previously-used frameworks to examine how restrictions on scope of practice related to abortion have changed over time.

Finally, the legal specialists offered that information on restrictions on scope of practice could supplement research on Catholic healthcare systems, providing a more complete picture of abortion access in Wisconsin and healthcare system attitudes regarding abortion services. Research could provide Wisconsin-specific information on who is impacted by restrictive covenants and the impact this has on physicians. The legal specialists also indicated that if this information is used in litigation regarding a provider's right to practice what they are trained and certified to do without employer restrictions, the litigant should be a physician at or near the end of their career.

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